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ENVIRONMENTAL PROTECTION AGENCY

40 CFR 51 and 52

[FRL - _____; E-Docket ID No. OAR-2002-0068; RIN 2060-AM58]

Prevention of Significant Deterioration (PSD) and Non-attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion: Reconsideration

40 CFR 51 and 52

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of final action on reconsideration.

SUMMARY: On October 27, 2003 and December 24, 2003, the EPA revised regulations governing the major New Source Review (NSR) programs mandated by parts C and D of title I of the Clean Air Act (CAA or Act). The rule changes from October 27, 2003, provide a category of equipment replacement activities that are deemed to be routine maintenance, repair and replacement (RMRR) activities and, therefore, are not subject to Major NSR requirements under the exclusion, while the December 24, 2003 rule changes amended the Prevention of Significant Deterioration (PSD) provisions of state programs that did not have approved state rules for PSD. Also on December 24, 2003, the US Court of Appeals for the District of Columbia Circuit stayed the new RMRR rules, pending judicial review. Following these actions, the Administrator received petitions for reconsideration. On July 1, 2004, we, the EPA, announced our reconsideration of certain issues arising from these two final rules and requested

comment on those issues. After carefully considering all of the comments and information received through our reconsideration process, we have concluded that no additional changes are necessary to the final rules. With respect to all other issues raised by the petitioners, we deny the requests for reconsideration.

DATES: This final action is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER.]**

ADDRESSES: EPA has established a docket for this action under Docket ID No. OAR-2002-0068 (Legacy Number A-2002-04). All documents in the docket are listed in the index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Publicly available docket materials are available in hard copy either electronically in the EDOCKET at http://www.epa.gov/edocket or in hard copy at the U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Avenue, Northwest, B102, Mail code: 6102T, Washington, DC 20460, Attention Docket ID No. OAR-2002-0068, Washington, DC 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Docket is (202) 566-1742.

FOR FURTHER INFORMATION CONTACT: Mr. David J. Svendsgaard, Information Transfer and Program Integration Division (C339-03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone number: (919) 541-2380; fax number : (919) 541-5509, or electronic mail at svendsgaard.dave@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. What are the regulated entities?

Entities potentially affected by the subject rule for today's action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups.

Industry Group	SIC[a]	NAICS[b]
Electric Services	491	221111, 221112, 221113, 221119, 221121, 221122
Petroleum Refining	291	324110
Industrial Inorganic Chemicals	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188
Industrial Organic Chemicals	286	325110, 325132, 325192, 325188, 325193, 325120, 325199
Miscellaneous Chemical Products	289	325520, 325920, 325910, 325182, 325510
Natural Gas Liquids	132	211112
Natural Gas Transport	492	486210, 221210
Pulp and Paper Mills	261	322110, 322121, 322122, 322130
Paper Mills	262	322121, 322122
Automobile Manufacturing	371	336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213
Pharmaceuticals	283	325411, 325412, 325413, 325414

[a] Standard Industrial Classification

[b] North American Industry Classification System.

Entities potentially affected by the subject rule for today's action also include State, local, and tribal governments.

B. How is this preamble organized?

The information presented in this preamble is organized as follows:

II. Background

On October 27, 2003, we published the Equipment Replacement Provision ("ERP") amendments to our regulations implementing the major NSR requirements of

the CAA.[1] The ERP amended the exclusion from major NSR for "routine maintenance, repair, and replacement" ("RMRR") activities at existing major sources. Several parties sought judicial review of the ERP in the US Court of Appeals for the District of Columbia Circuit. See *State of New York v. EPA*, No. 03-1380 and consolidated cases (DC Cir.). As a result of a court order, the ERP is "stayed" (i.e., not in effect) until the court decides this case.

On December 24, 2003, EPA published a rule amending the Prevention of Significant Deterioration (PSD) provisions of state programs that did not have approved state rules for PSD. 68 FR 74483. In each of these states, EPA previously had made the area subject to the PSD rules in 40 CFR section 52.21, the Federal Implementation Plan ("FIP") for PSD. Please see 68 FR 74483 (December 24, 2003), for additional background on this rule. Parties have also sought judicial review of this rule, and their petitions for review have been consolidated with the challenges to the ERP.

Also on December 24, 2003, a group of environmental organizations[2] petitioned EPA, pursuant to section 307(d)(7)(B) of the CAA, to reconsider three aspects of the

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[1]The October 27, 2003 final rule did not act on the "Annual Maintenance, Repair and Replacement Allowance" approach that we proposed on December 31, 2002 (67 FR 80920). We may act on this portion of the 2002 proposal in a subsequent rulemaking.

[2] The following parties filed the petition for reconsideration of the October 27, 2003 rule: Natural Resources Defense Council, Environmental Defense, Sierra Club, American Lung Association, Communities for a Better Environment, United States Public Interest Research Group, Alabama Environmental Council, Clean Air Council, Group Against Smog and Pollution, Michigan Environmental Council, The Ohio Environmental Council, Scenic Hudson, and Southern Alliance for Clean Energy.

Equipment Replacement Provision that we published on October 27, 2003. Specifically, the petitioners[3] asserted that our legal basis for the ERP is flawed, the basis for the 20 percent ERP cost threshold is arbitrary and capricious, and EPA has retroactively applied the ERP.

On January 16, 2004, a subset of the environmental petitioners on the ERP rule filed a petition for reconsideration of the December 24, 2003 rule that incorporated the ERP into the FIP portion of a State plan where the State does not have an approved PSD State Implementation Plan (SIP). This petition reiterated the issues raised in the December 24, 2003 petition concerning the ERP. On February 23, 2004, a group of states and the District of Columbia[4] filed a petition for reconsideration of the December 24, 2003 rule. This petition raised two issues. First, it asked for reconsideration on whether EPA needed to make a finding of deficiency for the PSD portions of each SIP before it amended the incorporation of the PSD FIP into the state plans. Second, it challenged whether EPA needed to provide an opportunity for comment on the revised format for incorporating the PSD FIP into state plans, which would automatically update the state plans whenever EPA amends the PSD FIP.

On July 1, 2004 (69 FR 40278), we granted reconsideration and requested comment on three issues raised by petitioners – specifically, the contentions that our legal

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[3] In this notice, the term "petitioner" refers only to those entities that filed petitions for reconsideration with EPA.

[4] The states that filed a petition for reconsideration of the December 24, 2003 rule are California, Connecticut, Illinois, Massachusetts, New Jersey, and New York, along with the District of Columbia.

basis is flawed, that our selection of 20 percent for the cost limit is arbitrary and capricious and lacks sufficient record, and that we should provide an opportunity for comment on the revised format for incorporating the PSD FIP into state plans. We decided to grant reconsideration on these issues because of the importance EPA attaches to ensuring that all have ample opportunity to comment. At that time, we did not act on the remaining two issues in those petitions.

On August 2, 2004, we held a public hearing on the issues for which we granted reconsideration. Five individuals gave oral presentations at the hearing. The transcript of their comments is located in Docket OAR-2002-0068 (Legacy Number A-2002-04), which can be accessed on the internet at http://www.epa.gov/edocket.

The public comment period on the reconsideration issues ended on August 30, 2004, and we allowed until September 1, 2004 to receive public comments for issues arising out of the August 2nd public hearing. More than 350 written public comments on the reconsideration issues were received. The individual comment letters can be found in Docket OAR-2002-0068 (Legacy Number A-2002-04).

III. Today's Action

At this time, we are announcing our final action on reconsideration of the three issues for which we asked for comment in our July 1, 2004 notice. We are also announcing our final decision on the remaining two issues that were raised by the petitioners. We are making available a document entitled, "Technical Support Document for the Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion: Reconsideration," EPA 456/R-05-003. This document contains

(1) a summary of comments received on the issues for which we granted reconsideration and our responses to these comments, and (2) a summary of petition issues for which we are not granting reconsideration, and our rationale for denying reconsideration. This document is available on our website at http://www.epa.gov/nsr/; and, through the National Technical Information Services, 5285 Port Royal Road, Springfield, VA 22161; telephone (800) 553-6846, email http://www.ntis.gov; and, from the US EPA, Library Services, MD C267-01, Research Triangle Park, NC 27711, telephone (919) 541-2777, e-mail library.rtp@epa.gov.

A. Three Issues for Which Reconsideration Was Granted

1. Legal Basis

Our July 1, 2004 notice noted that underlying our legal rationale for the ERP is a basic tenet of administrative law stated in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984). The *Chevron* Court held that expert agencies have the discretion to reasonably interpret ambiguous statutory terms and that such interpretations are due deference. *Id.* at 842 - 845. In the October 27, 2003 final rule and in the July 1, 2004 notice, we explained that the statutory definition of "modification," CAA 111(a)(4), and, in particular, the word "change" in the phrase "any physical change or change in the method of operation," is ambiguous. The word itself is ambiguous, and the use of "any" as a modifier, in the context of the statute, simply requires EPA to include an indeterminate number of changes as potential modifications[5] once EPA defines the ambiguous term "change."

[5] A physical change would be a modification only if it resulted in a significant emissions increase as we define the term.

The ERP, which establishes criteria for determining what equipment replacement activities do not constitute physical changes, is a rational interpretation of "physical change" in the definition of "modification." See 68 FR 61268-61274 for our more detailed legal support for the ERP.

In granting reconsideration, we invited comments on several legal arguments suggested by commenters on the meaning of the statutory definition of "modification." In particular, we noted that commenters had suggested that the plain meaning of the "modification" definition required that functionally equivalent equipment replacements not be deemed to be changes and, therefore, be deemed RMRR. We also noted that other commenters took the opposite view about the plain meaning of the statute. Both sides of this argument cited the principle from *Chevron* that where the statute's meaning is clear, the agency must give its meaning effect (the first step in statutory analysis under *Chevron*, or *Chevron 1*). Some commenters had argued that only *de minimis* exceptions could be allowed under the statute. Others had pointed out that a recognized principle of administrative law allows an agency to establish "bright line" criteria to reduce regulatory burden and provide certainty. We invited comment on these arguments and any other possible legal arguments when we granted reconsideration on the issue of whether our legal basis in the ERP was flawed.

We received a number of comments supporting and opposing the legal basis for our rule. Commenters renewed and expanded prior arguments that the definition of "modification" was clear and either prohibited or compelled treating like-kind replacements as physical changes when replacement resulted in a potential emissions

increase. Some comments, summarized below, addressed Congressional intent as construed by courts, provided specific textual analysis of the modification definition, and offered policy objections to the ERP. We discuss significant comments below and refer you to the TSD for this action for additional discussion of comments and responses.

a. Congressional Intent

Commenters assert that the ERP is contrary to Congressional intent and the decision in *Alabama Power v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). They characterize the opinion as holding that Congressional intent behind the modification provision was to include any physical change that increases emissions, even though it would undoubtedly prove inconvenient and costly to affected industries. They cite a portion of the opinion that declared, "the term 'modification' is nowhere limited to physical changes that exceed a certain magnitude." Additionally, they claim the Court found EPA's authority to exempt activity from "modification" was limited to *de minimis* activity. *Id.* at 400.

We disagree with the commenters' reading of *Alabama Power*. *Alabama Power* does not directly address whether like-kind replacements must be deemed to be physical changes. The *Alabama Power* Court addressed an exemption for physical changes that resulted in an emissions increase of less than 100 tons. It is in this context, where the replacement activity has been conceded to be a physical change, that the court states that the modification definition "is nowhere limited to physical changes that exceed a certain magnitude." *Alabama Power*, 636 F.2d at 400. In context, the "magnitude" language only addresses the size of the emission tonnage increase resulting from a "change," once the activity meets the definition of a "change." The Court did not have before it the

question of whether the phrase "any physical change" is ambiguous. Contrary to the commenter's assertions, the cited portion of the *Alabama Power* opinion discusses a *de minimis* exemption only in the context of emission increases and not in terms of what constitutes a physical change ("EPA does have the discretion . . . to exempt from PSD review some emission increases on grounds of *de minimis* or administrative necessity"). *Id*.

Moreover, the *Alabama Power* Court also expresses the expectation that "bubbling" (or netting) in calculating emission increases and an allowance for physical changes that result in *de minimis* increases in emissions "will allow for improvement of plants, technological changes, and *replacement of depreciated capital stock*, without imposing a completely disabling administrative and regulatory burden." *Alabama Power*, 636 F.2d at 400. (emphasis added). Our subsequent experience has shown that, even with netting, a definition of "physical change" as encompassing as that supported by these commenters is inadequate to allow for appropriate replacement of depreciated capital stock. See "New Source Review: Report to the President", June 2002 (Docket No. OAR-2002-0068, Document No. 0004). It simply is not the case that the *Alabama Power* opinion analyzes and requires the commenters' encompassing construction of "any physical change." Equally important, a narrow interpretation of ERP as advocated by commenters would create hurdles for ensuring that a process operates reliably, safely, and efficiently, thereby increasing the likelihood that net emissions would be higher.

The commenters point to several enforcement filings and other EPA pronouncements prior to promulgation of the ERP in which we said the definition of

modification was unambiguous and had broad application. Furthermore, they note that we repeatedly recognized that the structure of the Act demonstrates that Congress intended grandfathering to be of limited duration.

We recognize that, prior to promulgation of the ERP, we had not specifically asserted that our interpretation of "change" and the exclusions from NSR are based on an exercise of *Chevron* discretion. In some instances, such as in a decision of the Environmental Appeals Board (EAB), *In re: Tennessee Valley Authority*, 9 E.A.D. 357 (EAB 2000), and in briefs in various enforcement-related cases, we had interpreted "change" such that virtually all changes, even trivial ones, were encompassed by the Act. Thus, we generally had interpreted the exclusion as being limited to *de minimis* circumstances. However, in the ERP we asserted that EPA does have the authority to interpret these key terms through rulemaking. Upon further consideration of the history of our actions, the statute, and its legislative history, we said that we believe a different view is permissible, and, for policy reasons discussed in the ERP final rule, more appropriate. Therefore, we adopted our *Chevron*-based interpretation of the statute prospectively in the ERP final rule.[6]

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[6] We noted in the ERP final rule:

> We have taken positions in numerous court filings concerning the proper interpretation and usage of key statutory terms, such as "physical change" and "any physical change." These positions were based on permissible constructions of the statute of which the regulated community had fair notice, and correctly reflect the Agency's reasonable accommodation of the Clean Air Act's competing policies in light of its experience at the time it adopted the RMRR exclusion in 1980. The Agency has sought, and has obtained, deference for its interpretations, and, notwithstanding today's adoption of a revised interpretation of the statute and an expansion of the RMRR exclusion, the Agency shall continue to seek deference for those prior interpretations in ongoing enforcement litigation.

Subsequent to promulgating the ERP, we filed court papers noting that, as of the date of the final ERP rule, we adopted a new interpretation of the statute. Our position is most clearly spelled out in a filing we made in *United States v. Illinois Power Co., et al.*, Civil Action No. 99 - 833 (S.D. Ill.) ("*Illinois Power"*). As we stated to the *Illinois Power* Court, "the United States does not rely on any prior statements . . . that a very narrow construction of the 'routine maintenance' exemption is required by the Clean Air Act itself. Instead, the United States will continue to rely on EPA's narrow interpretation of its prior 'routine maintenance' exception, which remains applicable to this action." *Illinois Power*, Plaintiff's Reply to Defendants' Proposed Findings of Fact and Conclusions of Law (Liability Phase) at 5. We no longer interpret the language or structure of the NSR provisions of the Act as an expression of Congress's intent to limit "grandfathering" through the indirect means of the "modification" provision rather than through other provisions that clearly can reach all existing sources. See, e.g., CAA §110 (SIP provisions); CAA § 112 (hazardous air pollutant provisions); CAA §§ 401 - 416 (acid rain provisions).

Finally, one group of commenters argues that Congress's decision in 1977 to cross-reference the preexisting definition of "modification" in CAA section 111(a)(4) when it adopted the modification provision for NSR should have no impact on assessing whether the terms of the definition are ambiguous. They cite EPA's arguments in our August 2004 brief in *State of New York v. EPA*, D.C. Cir. Case No. 02-1387, which refuted arguments that EPA is compelled to interpret both the NSPS and the NSR

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68 Fed. Reg. at 61272, fn 14.

modification provisions the same way. They construe the "legal basis" discussion in our October 27, 2003, ERP final rule as arguing that Congress ratified our ERP interpretation when it enacted the 1977 amendments.

We disagree with the characterization of our argument in the October 27, 2003 preamble to the final ERP rule. Nowhere in that notice do we argue that Congress mandated adoption of the 1977 NSPS regulatory interpretation of what is a "modification" when it cross-referenced the definition in CAA 111(a)(4) into the NSR program. As we discussed in the cited passages of our briefs, we do not believe Congress intended to ratify the then-existing interpretation or "congeal" our NSR regulations as they stood under the NSPS program in 1977. Our discussion of the history of our interpretation of CAA 111(a)(4) simply points out the obvious: that words of CAA 111(a)(4) historically have been taken to have quite different meanings in the NSR and NSPS programs. From this, we argue that any words that can be given such divergent meanings for decades cannot have but one clear meaning on their face. To argue that the definition of "modification" in CAA 111(a)(4) is unambiguous, as the commenters have, one must advance an unusual position: that the same words, with no further definitions or legislative history, facially and unambiguously mean different things.

b. Textual analysis of the modification definition

It is axiomatic that the most clear expression of what Congress intended by the "modification" definition is in the words it chose to use. Many significant comments we received analyzed the structure of the definition and particular words and phrases in it.

One commenter argued that the statutory term "modification" itself is not

ambiguous, so the definition of modification should not be read to create ambiguity in the term. The commenter, who argued that the ERP is too generous in excluding equipment replacements from NSR, observed that the plain meaning of modification connotes moderate, as opposed to fundamental, change.

We disagree with the assertion that the ERP allows for "fundamental" change in an emission source. In focusing on the 20 percent criterion of the ERP, the commenter ignores other important criteria under the ERP that would, in any ordinary sense of the term, prohibit the possibility of fundamental change as a result of activities that meet the ERP exclusion. A source that maintains its basic design parameters is not fundamentally changed, nor is a source that replaces one piece of equipment with another that is functionally equivalent. Thus, the ERP does not allow for fundamental change of the type the commenter suggests that the term "modification" should prohibit. In fact, to clarify this, the ERP explicitly precludes activities that would change the basic design parameters from qualifying for a RMRR exclusion.

Moreover, we disagree with the commenter's assertion that the term "modification" itself is unambiguous and in no need of further clarification. In fact, we note that over the years permitting authorities have had to respond to numerous queries regarding whether certain activities constitute a "modification," a testament that there is considerable ambiguity surrounding this term. Apparently, Congress agrees with our view, because it supplied further definition in CAA 111(a)(4).

Many of the comments focused on the significance of the modifier "any" in "any physical change or change in the method of operation." In our October 27, 2003 final

rule, we said that the word "any" did not compel EPA to define what constitutes a "physical change" to include all activities that could conceivably be defined as a physical change. In our view, we had discretion to define what activities were physical changes, and once we defined physical change, "any" simply meant that any activity that met our definition of physical change could be a modification if it also increased net emissions.

In our July 1, 2004 notice, we invited comment on a recent Supreme Court case that construed a prohibition on states and localities enacting legislation to bar "any entity" from offering interstate telecommunications services to not apply to legislation that restrained political subdivisions of states from entering the field. *Nixon v. Missouri Municipal League*, 541 U.S. 125, 124 S. Ct. 1555, 1559 - 60 (2004). The *Nixon* Court observed that Congress's understanding of "any" can differ depending upon the statutory setting. *Id*. at 1561. This opinion reversed a case litigants had relied upon in seeking a stay of the ERP on the proposition for which it was cited.[7]

In discussing the significance of the modifier "any" in the statute and in discussing the *Nixon* case, commenters opposed to the ERP argued that numerous cases besides *Nixon* have held that terms modified by the word "any" must be given the most inclusive meaning possible, that such terms must be interpreted expansively, and that

[7]State and Municipal Petitioners' Emergency Motion for a Stay, *State of New York v. EPA*, D.C. Cir. No. 03-1380 and consolidated cases, at 8 fn.14 (citing *Missouri Mun. League v. FCC*, 299 F.3d 949, 954 (8th Cir. 2002), *rev'd sub nom. Nixon v. Missouri Mun. League*, 541 U.S. 125, 124 S. Ct. 1555 (2004)). A copy of this motion was submitted to the record as a comment on the reconsideration notice.

"any" has a broad meaning.[8] These commenters distinguished *Nixon* on the grounds that this case raised peculiar federalism concerns (i.e., the ability of a state to regulate its own political subdivisions) not present in CAA 111(a)(4) or the ERP.

Several other precedents establish that the principle on which *Nixon* relies, that the understanding of "any" can depend on the statutory context, is not limited to situations with federalism implications. *E.g., O'Connor v. U.S.*, 479 U.S. 27, 31 (1986) (statutory context shows "any taxes" limited to taxes of the Republic of Panama); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 - 85 (1956) ("any strike" does not include strike in response to unfair labor practices); *Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (FCC regulation narrowing "any . . . facilities or services" that a Bell operating company could offer affirmed when Court notes "textual analysis is a language game played on a field known as 'context'"). Therefore, we believe the "broader frame of reference" adopted by the *Nixon* Court is not an isolated and unsupported view of the law limited to cases raising federalism concerns.

None of the cases cited by the commenters stand for the proposition that a term modified by the word "any" invariably must be given its broadest meaning. In *Harrison* and in other cases, the Court found "no indication whatever" that Congress intended a narrower or limited construction of statutory term. These cases discuss a different statutory context than the adoption of the definition of "modification" in the NSR

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[8] *E.g., Harrison v. PPG Industries*, 446 U.S. 578 (1980); *United States v. Gonzales*, 520 U.S. 1 (1997); *Department of HUD v. Rucker*, 535 U.S. 125 (2002). A post-*Nixon* addition to this line of cases is *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 125 S. Ct. 385 (2004).

provisions of the CAA. These cases do not involve a situation in which Congress incorporated into a section of a statute a term that had been used in another section of the statute and which had been given a different meaning under that prior section. While there is no evidence that Congress compelled EPA to replicate its NSPS interpretation of "any physical change" in the NSR program, the fact that the words at issue were given a different construction in the NSPS is an indication that the words do not have a unique and, therefore, unambiguous meaning.

The cases cited by the petitioners and the *Nixon* line of cases are not, in fact, opposing and contradictory. Both support looking for indications in the statute that suggest a more limited meaning of the modified term is possible or intended. We believe such indications exist in the NSR context because the modification definition inserted into the NSR provisions by a 1977 technical amendment to the 1977 CAA Amendments cross-referenced the pre-existing term under CAA 111(a)(4).

Implicitly, at least one of the commenters critical of the ERP recognized that a broader frame of reference can apply by arguing that while in *Nixon*, a broad construction of "any" would have led to absurd, futile, and farfetched results, the same would not be true for the NSR modification definition. For NSR, according to the commenters, Congress placed a clear limit on what changes must be considered modifications - those that increase emissions.

In the definition of "modification," we believe a view that "any" compels a broad construction of the modified terms also has farfetched implications. The same word "any" that modifies "physical change in" also modifies "change in the method of

operation of." The commenters' argument proves too much. The argument would say that exemptions from the definition of modification on any basis other than *de minimis* increases would not be necessary or appropriate, even long accepted ones that limit the scope of "change in the method of operation." As the preamble to the final rule notes, many of these exemptions can result in non-*de minimis* increases in emissions. 68 Fed. Reg. at 61272. To accept the commenter's argument would mean that one word ("change") that modifies two clauses in a definition compels a broad construction of one modified clause while allowing discretion when it modifies the other clause.

Another commenter picks up on *Nixon*'s reliance on the doctrine of avoiding absurd or futile results and echoes the view that this doctrine would not apply in the context of the modification definition. In this commenter's view, EPA cannot claim that a broad construction of "any physical change" would lead to absurd or futile results when we adopted such a broad construction of "any physical change" in the past and continue to seek deference for such an interpretation in ongoing enforcement litigation.

We do not claim our prior interpretation is absurd or futile. The Agency claims that the use of the word "any" in the statute does not compel only our prior interpretation.

We note that under the NSPS program, we interpreted CAA 111(a)(4) to allow us to exempt "[m]aintenance, repair, and replacement which the Administrator determines to be routine for a source category." 40 C.F.R. 60.14(e)(1). In contrast, under the NSR program, historically we have interpreted the RMRR provision on a case-by-case basis, and we have not followed suit with the NSPS program in determining that the same activities are categorically exempt from RMRR. Thus, a modification that is

categorically exempt under the NSPS could be potentially subject to NSR under our historical RMRR interpretation. It would be incongruous to argue that the identical statutory text incorporated into both the NSPS and the NSR provisions "clearly" could support only one meaning in the NSR context while it supports a different meaning in the NSPS context. Rather than saying CAA 111(a)(4) is clear but has two distinct meanings, common sense suggests the wording is ambiguous and allows for an expert agency to adopt reasonable interpretations in the context of the programs.

Commenters incorrectly claim that we have recognized all equipment replacements, including "like-kind" replacements, to be "physical changes" within the ordinary meaning of the word. While our October 27, 2003, final rule recognized that "change" is susceptible to multiple meanings, and outlined many common uses of the word, we did so to illustrate that there is no one, unambiguous, common meaning for the word. That is the essence of ambiguity.

Several commenters agreed with our view that "any" should be interpreted within the "broader frame of reference" of its statutory context. One commenter argued that *Nixon* undermined much of the logic in *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990) (*WEPCO*). That case contains sweeping language that repeatedly stressed that "any" compelled a broad interpretation of "any physical change."

As we noted in our October 27, 2003 final rule, we believe that the *WEPCO* Court was correct to determine that the statute does not unambiguously allow all like-kind replacements to avoid NSR, which was the position advanced by WEPCO in that litigation and which is the position advanced in this reconsideration by certain

commenters. The Court's conclusion that the statute does not compel the outcome favored by WEPCO leads to a result that is completely consistent with our current view. Additionally, we continue to believe that the activities at issue in *WEPCO* were not RMRR under the rules at issue in that case. Furthermore, we continue to believe that, under the ERP, the equipment replacements at issue in that case would not automatically qualify as being excluded from major NSR. However, we agree with the commenter that *Nixon* calls into question the additional discussion in *WEPCO* that construes "any" to compel a broad view of what is a "physical change." In our view, "any physical change" is an ambiguous term that can be defined by the Agency through rulemaking.

Focusing on a different portion of the definition of "modification," commenters argue that Congress provided the only acceptable limitation on what physical changes are not subject to NSR as a modification, which is the requirement that the physical change result in an increase in emissions of any pollutant or the emission of any pollutant not previously emitted.[9] Commenters argue that an agency cannot imply an exemption to, or otherwise insert limiting language into, a categorical statutory provision, especially where Congress was specific in how it would allow the language to be limited.

We disagree with the commenters on three grounds. First, the commenters seem to assume the answer to the threshold question – that equipment replacements that meet the ERP criteria are "physical changes" – in order to say that we are creating an exemption for activity that is presumptively subject to NSR. We believe that there is no

[9]We note that it is to these limitations the *Alabama Power* Court said that we could establish *de minimis* increase levels.

such presumption prior to the agency defining the ambiguous term. Second, we believe that the implication of the commenters' argument would mean that several long-accepted exemptions from NSR would no longer be valid were their position adopted. These exemptions from "any . . . change in the method of operations" were discussed in our final rule legal basis. Finally, we believe that the commenters' argument would not give meaning to all the words of the definition of modification. The commenters' position reads the "any physical change or change in the method of operation" to be so inclusive that essentially the test for a modification becomes whether emissions increase at a source because there always will be some "change" to which the increase can be linked. In contrast, the ERP, as part of our overall approach to the definition of modification, gives meaning to both the "change" portion as well as the "emissions increase" portion of the definition.

To summarize: with respect to existing sources, the purpose of the NSR provisions is simply to require the installation of controls at the appropriate and opportune time. The kind of replacements that automatically fall within the equipment replacement provision established today do not represent such an appropriate and opportune time. Accordingly, and given that it is consistent with the meaning of "change" to treat this kind of replacement as not being a "change," we believe excluding them on that basis from the definition of "modification" as used in the NSR program is well calculated to serve all of the policies of the NSR provisions of the CAA, and is therefore a legitimate exercise of our discretion under *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984), to construe an ambiguous term. Likewise, we believe this approach is

consistent with the holding in the *WEPCO* case, and with some though not all of that case's reasoning.

Finally, one comment argued that EPA's position on the meaning of "change" is internally inconsistent. If equipment replacement is not a change, then the comment suggests EPA lacks authority to regulate changes that exceed 20 percent of the replacement cost. If equipment replacement is a change, then the comment suggests that an exemption can only be justified by *de minimis* authority.

We note that establishing bright line criteria in a manner that reduces regulatory cost and provide certainty is a well-recognized and accepted approach to clarifying ambiguous terms in statutes. See *Time Warner Entertainment Co. LP v. FCC*, 240 F.3d 1126, 1141 (D.C. Cir. 2001). The ERP simply establishes bright lines for when an equipment replacement activity is automatically excluded from major NSR.

As we explained in our final ERP rule preamble, this approach is consistent with our approach towards "reconstruction" in the NSPS context. Under the NSPS rules, we treat a 50 percent threshold as a trigger for scrutiny as to whether the source must meet the NSPS. 40 CFR 60.15(b)(1). We then assess the technological and economic feasibility of meeting the NSPS standard. 40 CFR 60.15(b)(2).

In the ERP, we do not take the position that all like-kind or functionally-equivalent replacements automatically are or are not changes. Instead, we simply draw criteria for when such activities are excluded from NSR and when the multi-factor RMRR approach applies.

c. Policy objections

Several comments disputed the manner in which we exercised our discretion in defining which equipment replacement activities are not changes. As noted below, these comments tended to infer that we were defeating Congressional intent through the practical effects of the ERP.

Some commenters criticize the ERP as allowing for perpetual immunity from emissions control requirements. These commenters claim that the ERP reflects EPA's disagreement with Congress's determination that the time to install controls is when a unit is modified. In the commenters' opinion, EPA's belief that it is not plausible that replacements would proceed if emissions controls needed to be installed lacks a factual basis and is contrary to the statutory scheme.

Our disagreement over what constitutes a modification is with the commenter and not Congress. Major source NSR permitting is required unless the source can meet the criteria of the ERP, is not otherwise exempt under the RMRR provision or another NSR exemption or exclusion, and the source does not accept enforceable emissions limit below the significant emissions increase levels. When a replacement is a modification under our clearer, more focused definition, NSR permitting will apply, consistent with the Act.

We do not believe, however, the modification provisions of the CAA should be interpreted to ensure that all major facilities either must eventually trigger NSR or must degrade in performance, safety, and reliability. In fact, such an interpretation cannot be squared with the plain language of the CAA. An existing source triggers NSR only if it makes a physical or operational change that results in an emissions increase. Thus, a

facility can conceivably continue to operate indefinitely without triggering NSR – making as many physical or operational changes as it desires – as long as the changes do not result in emissions increases. This outcome is an unavoidable consequence of the plain statutory language and is at odds with the notion that Congress intended that every major source would eventually trigger NSR or otherwise fall into disrepair. Moreover, there is nothing in the legislative history of the 1977 Amendments, which created the NSR program, to suggest that Congress intended to force all then-existing sources to go through NSR. To the extent that some members of Congress expressed that view during the debate over the 1990 amendments, such statements are not probative of what Congress meant in 1977. *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 - 86 (1994), and cases cited.

To the extent that our preamble to the ERP final rule suggested that no replacements ever would take place if controls were required, we recognize that such a generalization is not established by the record, nor was it our intent to make such a sweeping statement. Nevertheless, the substantial body of testimony and studies in the record demonstrates that the vagueness of the RMRR provision operated as a substantial restraint on replacement activity even when such activity would result in safer, more efficient, more reliable processes that had the potential to lower emissions in the overall economy by displacing higher polluting production. See "New Source Review: Report to the President", June 2002 (Docket No. OAR-2002-0068, Document No. 0004). Based on the record, we believe that an owner or operator of a source often has the financial incentive to repair existing equipment or artificially constrain production, rather than

install emission controls. Therefore, as a general matter, the replacement of that equipment is not, in fact, an opportune time for the installation of such controls. It follows that a policy treating such replacements as an NSR trigger generally will not lead to the installation of controls. Rather, it will merely create incentives to make a plant less productive than its design capacity would allow it to be.

These commenters also claim that Congress intended to strike a different balance between the nation's economic and environmental interests than that which the ERP strikes. They believe requiring emission controls on modified sources would facilitate economic growth and preserve air quality. They point out that the 1977 House Committee report noted, when the emissions impact of each new or modified plant is minimized, "then more and bigger plants will be able to locate in the same area without serious air quality degradation."

We agree that we strike the balance between productive capacity of the nation and the protection of the environment differently than these commenters would. We disagree with the assertion that the balance we struck inappropriately weights either consideration. To the extent that Congress left discretion to anyone in striking such a balance, it is afforded to the Administrator and not to litigants. The record demonstrates that our approach, in concert with other CAA programs, is consistent with preserving clean air resources and improving air quality in areas that are not attaining the NAAQS as well as Congress's intentions written explicitly in Sec. 101(b)(1) to preserve the productive capacity of the nation's population and in Sec. 160(3) to balance economic and environmental concerns.

When balancing the economic and environmental interests of the nation, we have also considered that there are many other systematic air programs that will not merely prevent emission increases from existing sources but even reduce emissions at sources we expect to use the ERP. In fact, the entire state implementation plan (SIP) program under Sec. 110(a) establishes a framework for systematic reduction of emissions from existing sources when such reductions are deemed necessary to meet or maintain the NAAQS. The CAA places primary responsibility on the States to achieve the emissions reductions needed to attain and maintain the NAAQS. Over the years, States have in fact achieved significant emissions reductions in furtherance of this obligation.

To assist States, we have developed model market-based programs patterned after the successful Acid Rain provision in Title IV of the CAA. For example, EPA's recently issued "Clean Air Interstate Rule (CAIR)," will ensure, through States adopting a "cap and trade" or other program approach, that overall emissions from electric utilities throughout much of the Eastern part of the country will meet overall emission limits that are sharply below that which they emit today. CAIR ensures that, by 2015, SO2 and NOx emissions will be permanently reduced by 5.4 million tons and 2.0 million tons, respectively, over 2003 levels. Additional emission reductions will occur after 2015 when CAIR is fully implemented.

There are other CAA programs, as well, that are specifically tailored to require emission reductions from existing utility and nonutility sources. These programs include the Maximum Achievable Control Technology (MACT) standards that apply to new and existing sources of air toxics and Control Technique Guidelines that provide guidance to

states in determining Reasonably Available Control Technology (RACT) for sources in ozone nonattainment areas. All of these CAA measures will apply systematically to existing sources, and are unaffected by the applicability or non-applicability of any NSR exclusion, such as the RMRR exclusion and its further definition as set forth in the ERP. And, in appropriate circumstances, a State may seek to use CAA Section 126 to petition for additional controls on out-of-state sources.

Even in the absence of these other CAA programs, we note that the substitution effect of replacing deteriorating emission sources with well-maintained emission sources will generally reduce emissions per unit of output. The ERP itself should not materially affect demand in markets. Thus, to the extent individual sources will increase output (and emissions) following maintenance allowed by the ERP, output (and emissions) at other plants will decrease. Thus, we conclude that the ERP will not lead to an overall emission increase.

In contrast to the CAA programs discussed above that systematically and efficiently obtain emission reductions, the NSR program for existing sources, as that program existed before the ERP, was applied in a scattershot manner, only triggered by "modifications" however defined on a case-by-case manner. Under NSR, emissions reductions can only be obtained in a "catch-as-catch-can" manner, and there never has been and never can be a date certain by which all existing sources in an area of the country must comply with an emission cap or a NAAQS. Moreover, as fully explained in our recent brief filed in defense of the NSR Improvements Rule of December 31, 2002, the NSR program is not an emission reduction program. It is a program to limit emission

increases resulting from physical and operational changes. Brief for Respondent at 73 - 75, *State of New York v. US EPA*, No. 02-1387 & consolidated cases (D.C. Cir.) ("If Congress had intended to compel decreases in emissions, it would be irrational for the requirement to be triggered only when a facility, in fact, increases its emissions"). In light of the programs under the Act that systematically and efficiently allow for both reductions in emissions and firm caps on emissions, and the scattershot applicability and limited goals of NSR program with respect to existing sources, it was appropriate for us to strike the balance of economic and environmental interests in accordance with the CAA, as we did when we changed our method for implementing the modification definition in the NSR program.

Commenters suggest that EPA's decision in promulgating the ERP is not entitled to deference because, in their view, it appears that Congress would not have sanctioned an interpretation that allows sources to conduct multi-million dollar refurbishment activities that increase emissions without triggering NSR. However, the record establishes that adoption of the ERP will not cause overall emissions to increase, while, at the same time, safety, efficiency, and reliability of plants will improve. Furthermore, improvements in safety, efficiency, and reliability improve environmental performance by minimizing the frequency of startup, shutdowns, and malfunctions. While the record contains some conflicting data and studies, Congress left the weighing of this information and the forming of policies based on this information to EPA as an expert agency. We considered the quality and validity of the submitted data and studies in developing our conclusions. Our decisions in this matter are entitled to deference under *Chevron*.

2. The 20 Percent Replacement Cost Threshold

In the December 31, 2002 proposed rule, EPA solicited comments on the ERP approach. At that time, we sought input on a range of possible percentages of cost that could serve as one of the criteria that must be met to qualify for the RMRR exclusion from NSR. We asked for comment on percentages ranging up to 50 percent, the threshold for reconstruction under the New Source Performance Standards (NSPS) program. 67 FR at 80301.

Under the ERP, a project must meet four separate requirements before it is automatically excluded from NSR pursuant to the ERP. The 20 percent replacement cost threshold is but one of the four requirements. Thus, projects that meet the 20 percent threshold are not exempt from major NSR under the ERP if they do not meet the other necessary criteria in the final rule. These other criteria require that the replaced component: (1) be identical or functionally equivalent; (2) does not alter the basic design parameters of the process unit; and (3) does not cause the process unit to exceed any emission limitation or operational limitation (that has the effect of constraining emissions) that applies to any component of the process unit and that is legally enforceable.

Some commenters have asserted that an equipment replacement project would be excluded from NSR if it costs 20 percent or less of the replacement cost of a process unit. However, a replacement project must meet all four of the ERP criteria for the ERP to apply. Thus, only if the replaced component is (1) identical or functionally equivalent, (2) does not alter the basic design parameters of the process unit, and (3) does not cause

the unit to exceed any emission or operational limit, will the 20 percent criterion be relevant. Of all of these qualifiers, including the 20 percent cost threshold, the key qualifier is that the equipment replacement is "like-kind" (i.e., identical or functionally equivalent). This criterion provides strong support for our determination and conclusion that where the ERP applies, the process unit has undergone "no change" as a result of the activity at issue. Thus, the 20 percent cost threshold serves primarily as an administrative threshold, by which activities that fall beneath threshold and which also meet the other rule criteria safeguards qualify automatically as RMRR, while those activities that meet the other criteria but are over the 20 percent cost threshold may still be RMRR, but only by applying the multi-factor RMRR approach.

In the final ERP, we presented policy arguments and data analyses supporting 20 percent of replacement costs of a process unit as the threshold cost that would entitle an equipment replacement activity (or aggregation of activities) to qualify automatically as RMRR, if the other three criteria were met. See 68 FR 61255-58. In short, we received a substantial amount of industry data – both from electric utilities and from other industry sectors – that supported a decision to set the threshold at 20 percent. These data show that many like-kind replacements occurring at facilities typically cost less than 20 percent of the process unit's value and do not increase emissions. We also conducted case studies on a number of industries, analyzed the costs involved in the *Wisconsin Electric Power Company v. Reilly* ("WEPCO") case (See 893 F.2d 901 (7th Cir. 1990)) and other relevant information, and provided a legal basis as to why 20 percent is a reasonable ERP cost threshold for equipment replacements across all industries. We also stipulated other

rule criteria which must be met to qualify for the ERP. The ERP allows sources to know, with certainty, that RMRR can be conducted without delay in situations where the 20 percent replacement cost criterion and other specified criteria are met.

Petitioners asked EPA to reconsider the 20 percent cost threshold, and claimed that none of EPA's arguments supporting the threshold had appeared in the proposed rule. We granted reconsideration on this issue and solicited additional comment on the data, our analyses, and the policy considerations supporting the 20 percent threshold. We also invited comment on whether it is appropriate to consider approaches used by local governments in determining construction building code applicability when establishing criteria for RMRR determinations.

Thus, our goal in selecting the cost threshold is not to create a bright line below which any activity is excluded solely based on its cost. Rather, the threshold is intended to operate in combination with the three other ERP criteria as a screen for determining when the multi-factor RMRR approach is applicable and when it is appropriate to automatically exclude an activity as RMRR based on satisfying the three non-cost ERP criteria. As discussed below, we continue to believe that 20 percent is an appropriate threshold for this purpose. The available data indicate that the 20 percent threshold will effectively identify those more significant projects for which applying the multi-factor RMRR approach is prudent.

Another important factor of the ERP is that related activities must be aggregated in the same way as they would have to be aggregated for other NSR applicability purposes. Under our current policy of aggregation, two or more replacement activities

that occur at different times are not automatically considered separate activities solely because they happen at different times. In the case of replacing an entire facility, it is not feasible that an owner or operator could successfully argue that multiple projects occurring one after the other are not related to one another and should not be aggregated for applicability purposes. These other rule criteria play an important part in determining what replacements can qualify for the ERP.

Much of the comment on the 20 percent replacement value threshold focused on our use of six non-utility case studies that we believe support our selection of a 20 percent replacement value threshold. Though equipment replacement activities vary widely across industry sectors, the six industry sector studies (pulp and paper mills, automobile manufacturing, natural gas transmission, carbon black manufacturing, pharmaceutical manufacturing, and petroleum refining) indicated that equipment replacement activities of the type allowed under the ERP generally do not cause increases in actual emissions. Additionally, though the six studies address specific case examples from only a part of regulated industry, the data indicated that most typical replacement activities fall within the 20 percent threshold, and that some major replacement activities will cross the 20 percent threshold and be subject to the multi-factor RMRR approach.

We received a number of comments through the reconsideration process that were supportive of the calculations performed in the case studies of the six industries. Many of these comments came from the trade groups representing industries that were analyzed in the case studies. These organizations – including the American Forest & Paper Association, Alliance of Automobile Manufacturers, National Petrochemical & Refiners

Association, and Interstate Natural Gas Association of America – supported the analyses conducted and conclusions reached in the case studies for each of their industries. In some cases, these trade groups provided further amplification of their cost ranges for projects, which provided additional depth and support to the conclusions of the report. Other commenters stated that the case studies failed to provide sufficient data to support the 20 percent cost threshold.

We never claimed that the case studies encompassed all equipment replacement activities at these industries. Further, we recognize that the case studies do not justify exempting all "routine" equipment replacement activity in any one of the case study industries. As discussed elsewhere in this notice, activities falling below the 20 percent replacement value threshold are not exempt under the ERP if they do not meet the other three criteria of the rule. It is important to note that the case studies were performed prior to decisions on the exact form and content of the final rule. If the studies had chosen a different set of assumptions (e.g., for costing of projects, or in defining the process unit), they may have identified additional equipment replacement projects exceeding 20 percent in cost. Furthermore, these studies showed industry-wide results, not plant-specific determinations. Under the ERP, if a plant-specific replacement activity does not satisfy all four of the criteria that must be met to qualify for the RMRR exclusion, then the activity is subject to the multi-factor RMRR approach. The studies indicate that larger, less frequent maintenance activities could exceed the ERP cost threshold and, consequently, would be subject to the multi-factor RMRR approach.[10] Thus, we do not

[10] As the Alliance of Automotive Manufacturers pointed out in their comment letter, despite the claims of the petitioners,

believe there is a basis, nor did the petitioners provide one, that all equipment replacements in these industries would be exempt under a 20 percent cost threshold.

We continue to believe that this information on other industrial sectors beyond electric utilities supports our 20 percent bright line test. In short, the case studies support our view that it is reasonable to assume that equipment replacement activities in the utility industry are similar enough to replacement practices in other industry, such that the 20 percent value determined for utilities is appropriate for industry as a whole.

While most industry commenters agreed that the 20 percent threshold was adequate and reasonable and was well supported by available data, several industry commenters provided additional data as further support that the 20 percent threshold is appropriate. For example, Solar Turbines estimates for their products (turbines of 1 to 14 megawatts in capacity), a periodic refurbishing of the gas producer unit – normally performed every 4 years – would cost 6 to 14 percent of the replacement cost, depending on the extent of deterioration. The Gas Turbine Association noted that the restoration cost as a percentage of total equipment replacement cost varies significantly with turbine unit size. According to the Gas Turbine Association, one supplier estimated a range from 9 percent for a combined cycle system to over 20 percent for a simple cycle system. Other commenters – including the National Petrochemical & Refiners Association and the American Forest & Paper Association – further supported the 20 percent equipment replacement cost threshold providing lists of their plant maintenance activities, many of which were beneath 20 percent in cost, and explained why they felt that their listed

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the Abt Study did consider typical replacement projects for their industry that exceeded the 20 percent cost threshold.

projects are routine. We have evaluated the projects described by commenters and, assuming that they would meet all other criteria of the ERP, these projects would not be the types of activities that would be subject to the multi-factor RMRR approach.

We should note, however, that by referring to these lists provided by industry, we are not categorically determining that these activities are RMRR. As we have explained above, the 20 percent threshold is only one part of the ERP. Therefore, each activity must be evaluated against not only the 20 percent cost threshold but also the other three rule criteria before making a determination that these activities are RMRR under the ERP.

Comments filed by the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) suggested that we reject the percent threshold approach and replace it with a list of RMRR activities, along with a list of projects that are not RMRR, for each major industrial sector. Prior to promulgating the ERP, we evaluated developing a list of activities that are considered RMRR as a component of an overall RMRR program. Although it was decided that we could develop a list for industry sectors for which we had ample amounts of information, we believe that there are too many activities in too many industries, and an excessive number of facility-specific particulars, to effectively improve major NSR implementation by creating such lists. We also were concerned that such lists would need to be updated often.

We believe the ERP provides more clarity than does the multi-factor approach that permitting authorities employed in making past RMRR determinations. With the

multi-factor RMRR approach, no "bright lines" were ever established, either through rule or guidance, to evaluate the factors (e.g., nature/extent, purpose, frequency and cost), which contributed to regulatory uncertainty. Conversely, to the greatest extent possible, the ERP provides "bright lines" by specifying criteria that must be met to qualify as RMRR. Of course, even with the ERP, there will be times when a permitting authority must make judgment calls, such as over whether the process unit's basic design parameters will change as a result of the equipment replacement. However, we believe that the ERP will enable these sorts of decisions to be more limited to engineering judgments and, therefore, less contentious (and more uniform from jurisdiction-to-jurisdiction) than the decisions required under the multi-factor test.

The EPA continues to believe that our basis for selection of the 20 percent replacement cost of the process unit is not arbitrary and capricious, and that there is support in both the rulemaking record and preamble for the 20 percent replacement cost threshold. Considering all of this information, together with the additional supporting data provided by commenters in response to the reconsideration issues, we believe our decision to establish the cost threshold at 20 percent is strongly supported and persuades us that we have established the correct cost threshold for the ERP.

3. Revisions to the Format for Incorporating the PSD FIP into State Plans

As discussed above, the December 24, 2003 final rule revised the PSD provision in each state plan that lacked an approved state regulation concerning PSD. In lieu of an approved PSD SIP, each of these state plans contained a reference incorporating the relevant provisions of 40 CFR 52.21, the PSD FIP, that applied within the state. Prior to

the December 24th rule, we incorporated the relevant paragraphs of 40 CFR 52.21 by referring to the range of paragraphs from the first paragraph incorporated to the last paragraph. This format required updates every time we added paragraphs to section 52.21. The December 24th rule adopted a different cross-referencing format– "40 CFR 52.21 except paragraph (a)(1)." Under the new format, the cross-references would automatically update whenever new sections were added to the PSD FIP.

We granted reconsideration and solicited comment on the issue of the new format and its ability to automatically update affected state plans whenever EPA modifies the PSD FIP. We did not receive comments in opposition of this new format and thus will not change it. We believe the automatic update function will eliminate paperwork delays and typographical errors associated with future updates to federal PSD requirements. It will reduce the potential for confusion when the PSD rules are updated and will ensure that the relevant federal provisions are included in updated PSD FIPs in a consistent and efficient manner.

B. Remaining Issues in Petitions for Reconsideration

We denied two issues contained in petitioners' requests for reconsideration because they failed to meet the standard for reconsideration under section 307(d)(7)(B) of the CAA. Specifically, on these issues, the petitioners have failed to show: that it was impracticable to raise their objections during the comment period, or that the grounds for their objections arose after the close of the comment period; and/or that their concern is of central relevance to the outcome of the rule. We discuss our reasons for denying reconsideration in the Technical Support Document, which is available on our website at

http://www.epa.gov/nsr. We have concluded that no clarifications to the underlying rules are warranted for these two remaining issues, as described below.

1. Petitioners' claim that EPA retroactively applied the ERP

Petitioners' claimed that EPA retroactively applied the ERP, citing an EPA official's announcement in November 2003 that the Agency would no longer pursue past RMRR violations if the cases had not been filed. In response, we are, and have been, pursuing all filed cases and will continue to file new cases as appropriate. Our decisions on which cases to file is guided by a myriad of factors, including available resources and environmental protection. We acknowledge that the ERP is stayed and not currently effective in any jurisdiction. We continue to request information and put violators on notice when they violate our rules and policies. We note that none of the ERP rule revisions apply to any changes that are the subject of existing enforcement actions that the Agency has brought and none constitute a defense thereto.

As discussed in the final ERP preamble (68 FR 61263), according to the U.S. Supreme Court, an agency may not promulgate retroactive rules absent express congressional authority. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988). The CAA contains no such expressed grant of authority, and we do not intend by our actions today to create retroactive applicability to the ERP. The promulgated ERP applies only to conduct that occurs after the rule is effective.

2. Petitioners' claim that EPA cannot modify a State's SIP without a finding of deficiency

Petitioners' opposed the provisions in our FIP rule published on December 24, 2003, stating that EPA doesn't have the authority to issue a FIP without a finding of deficiency or notice of such deficiency as required under section 110(k)(5), 42 USC §7410(k)(5). They noted that, in order to require a State to revise its SIP, the EPA must find that a SIP is "inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollution described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter." They further noted that EPA can only require a SIP revision upon the finding that a particular SIP is deficient.

We are not issuing a new FIP. Rather, we are modifying an existing FIP. As such, the original findings of inadequacy of the plans for states subject to the PSD FIP continue to apply because these states never submitted an approvable PSD program in the first place, or have not submitted a revised program since EPA's disapproval of their earlier submission. Our longstanding procedure has been to incorporate §52.21 into the applicable implementation plan for a state where there is no approved, SIP-based, permitting program. In every PSD rulemaking since the program's inception, we have incorporated all provisions of the promulgated rules into the applicable implementation plan for a state where there is no approved, SIP-based, permitting program. (See 68 FR 11317-11318.) We again are taking these actions in the case of the December 24, 2003 rules.

As a result, we fail to see how the petitioning states were not clearly on notice about our intentions for these portions of the rule. Thus, EPA believes states subject to

the PSD FIP had adequate notice and opportunity for comment that EPA planned to amend the FIP citations to §52.21 to reflect any changes EPA made to §52.21 in the final NSR rule. Therefore, the petitioners have failed to meet the procedural requirement for reconsideration. Moreover, EPA does not believe it makes sense for states subject to the PSD FIP to have the option to pick what portions of the FIP should apply – these states are free to submit PSD programs for approval as SIP revisions if they wish to apply something other than §52.21 in its entirety (although we are making no conclusion about the approvability of a program that does not include all the elements of §52.21 at this time). Therefore, even if the petitioners had been correct that a procedural error had occurred in this instance, the outcome would not have been of central relevance to the outcome of the rule.

It is inherent in the regulatory nature of a FIP that we retain the authority to make appropriate changes to the Federal Program and that these changes will automatically apply in any jurisdiction in which the Federal FIP applies whether or not we delegate authority to a State to implement the PSD FIP. We believe that the ERP improves the ability of a State to "attain or maintain the relevant NAAQS, or to mitigate adequately the interstate pollution transport." As noted in the preamble to the final ERP (68 FR 61255), nothing in the promulgated ERP would prevent a State or local program from imposing additional requirements necessary to meet Federal, State or local air quality goals.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Agency must

determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, EPA determined that this rule is a "significant regulatory action" within the meaning of the Executive Order. As such, EPA has submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Paperwork Reduction Act

The information collection requirements (ICR) for this rule have been prepared under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. The EPA has deferred submission of the ICR to Office of Management and Budget (OMB) pending judicial

review of the ERP. An ICR document has been prepared by EPA (ICR No. 1230.14), and a copy may be obtained from Susan Auby, U.S. Environmental Protection Agency, Office of Environmental Information, Collection Strategies Division (2822T), 1200 Pennsylvania Avenue, NW, Washington, DC 20460-0001, by e-mail at auby.susan@epa.gov, or by calling (202) 566-1672. A copy may also be downloaded off the internet at http://www.epa.gov/icr. The information requirements included in ICR No. 1230.14 are not enforceable until OMB approves them.

The information that ICR No. 1230.14 covers is required for the submittal of a complete permit application for the construction or modification of all major new stationary sources of pollutants in attainment and nonattainment areas, as well as for applicable minor stationary sources of pollutants. This information collection is necessary for the proper performance of EPA's functions, has practical utility, and is not unnecessarily duplicative of information we otherwise can reasonably access. We have reduced, to the extent practicable and appropriate, the burden on persons providing the information to or for EPA. In fact, we feel that this rule will result in less burden on industry and reviewing authorities since it streamlines the process of determining whether a replacement activity is RMRR.

However, according to ICR No. 1230.14, we do anticipate an initial increase in burden for reviewing authorities as a result of the rule changes, to account for revising state implementation plans to incorporate these rule changes. As discussed above, we expect those one-time expenditures to be limited to $580,000 for the estimated 112 affected reviewing authorities. For the number of respondent reviewing authorities, the

analysis uses the 112 reviewing authorities count used by other permitting ICR's for the one-time tasks (for example, SIP revisions).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purpose of responding to the information collection; adjust existing ways to comply with any previously applicable instructions and requirements; train personnel to respond to a collection of information; search existing data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When this ICR is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the Federal Register to display the OMB control number for the approved information collection requirements contained in this final rule.

C. Regulatory Flexibility Act

The EPA has determined that it is not necessary to prepare a regulatory flexibility analysis in connection with this final rule.

For purposes of assessing the impacts of today's rule on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administrations' regulations at 13 CFR 121.201; (2) a small governmental jurisdiction

that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, EPA has concluded that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives "which minimize any significant economic impact of the proposed rule on small entities." 5 U.S.C. Sections 603 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

We believe this final rule will reduce the regulatory burden associated with the major NSR program for all sources, including all small businesses, by improving the operational flexibility of owners and operators, improving the clarity of requirements, and providing alternatives that sources may take advantage of to further improve their operational flexibility. We have therefore concluded that today's final rule will relieve regulatory burden for all affected small entities.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Pub. L. 104-4,

establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation as to why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan.

The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that today’s rule does not contain a Federal mandate that

may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. The change in this rule is expected to result in a small decrease in the burden imposed upon reviewing authorities in order for them to be included in the State's SIP, as well as other small increases in burden discussed under "Paperwork Reduction Act." In addition, we believe this final rule will actually reduce the regulatory burden associated with the major NSR program by improving the operational flexibility of owners and operators, and improving the clarity of requirements. Thus, today's action is not subject to the requirements of sections 202 and 205 of the UMRA.

For the same reasons stated above, we have determined that today's action contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's action is not subject to the requirements of section 203 of the UMRA.

E. Executive Order 13132—Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This final rule does not have federalism implications. It will not have substantial

direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. Thus, Executive Order 13132 does not apply to this rule. Nonetheless, EPA did consult with representatives of state and local governments in developing this rule, through face-to-face consultations and through soliciting comment from State and local officials in our July 1, 2004 Federal Register notice.

F. Executive Order 13175—Consultation and Coordination with Indian Tribal Governments

Executive Order 13175, entitled "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." Today's final action does not have tribal implications as specified in Executive Order 13175. This action will benefit permitting authorities and the regulated community, including any major source owned by a tribal government or located in or near tribal land, by providing increased certainty as to making RMRR determinations within the NSR program. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045—Protection of Children from Environmental Health Risks and Safety Risks

Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that:

(1) is determined to be "economically significant" as defined under Executive Order 12866; and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

Today's action is not subject to the Executive Order because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. We believe that today's action as a whole will result in equal or better environmental protection than provided by earlier regulations, and do so in a more streamlined and effective manner. As a result, today's final rule is not expected to present a disproportionate environmental health or safety risk for children.

H. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Today's action is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Today's rule improves the ability of sources to maintain the reliability of production facilities, and effectively utilize and improve existing capacity.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Pub. L. No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical.

Voluntary consensus standards are technical standards (for example, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

Today's action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Congressional Review Act

The Congressional Review Act (CRA), 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 808 allows the issuing agency to make a rule effective sooner than otherwise provided by the CRA if the agency makes a good cause finding that notice and public procedure is impracticable, unnecessary or contrary to the public interest. This determination must be supported by a brief statement. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the

reasons therefor, and established an effective date of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

V. Statutory Authority

The statutory authority for this action is provided by sections 101, 111, 114, 116, 301, and 307 of the CAA as amended (42 U.S.C. 7401, 7407, 7411, 7414, 7416, and 7601).

VI. Judicial Review

Under section 307(b)(1) of the Act, the opportunity to file a petition for judicial review of the October 27, 2003 final rule or the December 24, 2003 final rule has passed. Judicial review of today's final action is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit by **[insert date 60 days after publication in the Federal Register]**. Any such judicial review is limited to only those objections that are raised with reasonable specificity in timely comments. Under section 307(b)(2) of the Act, the requirements that are the subject of the October 27, 2003 and December 24, 2003 final rules and today's final action may not be challenged later in civil or criminal proceedings brought by us to enforce these requirements.

List of Subjects in 40 CFR Parts 51 and 52

Environmental protection, Administrative practices and procedures, Air pollution control, Intergovernmental Relations, New source review, Prevention of significant deterioration, Routine maintenance, repair and replacement, Equipment replacement.

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Dated:

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Stephen L. Johnson, Administrator